

Before the
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GENERAL COUNSEL
OF COPYRIGHT

JAN 15 1997

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In re: Determination of Statutory)	
License Terms and Rates for Certain)	No. 96-5
Digital Subscription Transmissions)	CARP DSTR
of Sound Recordings)	

**REPLY IN SUPPORT OF MOTION TO COMPEL
THE RECORDING INDUSTRY ASSOCIATION OF AMERICA
TO PRODUCE DOCUMENTS UNDERLYING ITS DIRECT CASE OR,
IN THE ALTERNATIVE, TO STRIKE TESTIMONY RELATING THERETO**

Digital Cable Radio Associates ("DCR"), by its attorneys and pursuant to 17 U.S.C. § 801(c) and to Section 251.45 of the Rules of the Copyright Office, 37 C.F.R. § 251.45, and the Copyright Office's Order of November 27, 1996 ("the Order"), submits the following reply in support of its Motion to Compel the Recording Industry Association of America ("RIAA") to produce certain documents or, in the alternative, to strike the testimony relating thereto (filed December 27, 1996) ("Motion").

DCR filed the foregoing Motion because the RIAA failed to comply with the basic requirements of discovery in this proceeding. As set forth in its Motion, DCR requested the production of documents underlying the RIAA's direct case.^{1/} DCR's Motion focused on requests made with respect to the testimony of Larry D. Gerbrandt, David Wilkofsky, and Zachary Horowitz. The RIAA failed to respond to almost every issue raised in the Motion.

^{1/} See Letter from Fernando R. Laguarda to Steven M. Marks, dated December 5, 1996, attached to the Motion at Ref. No. 1 ("DCR Request").

I. THE KAGAN DATA

Prior to filing its Motion, DCR made fifteen requests of the RIAA with respect to the testimony of Larry D. Gerbrandt. Ten requests specifically related to documents underlying the revenue and programming expenditures referred to in Mr. Gerbrandt's testimony.^{2/} All of this was made patently clear in DCR's Motion.

In response to DCR's requests, the RIAA provided documents that merely restated the same numbers already provided by Mr. Gerbrandt.^{3/} In its opposition to the Motion, the RIAA claims that DCR's requests, or DCR's Motion, were somehow vague or unclear. Nothing could be further from the truth. DCR's Motion simply stated the obvious: the RIAA has failed to substantiate the bottom line figures proffered by Mr. Gerbrandt. Having failed to meet its obligation, the RIAA should be compelled to produce the documents.

The RIAA's opposition makes no sense. The fact that Mr. Gerbrandt referred to "newsletters published by Kagan" and "portions of a proprietary Kagan database" should not shield the component figures underlying the Kagan data from discovery. The figures provided by the RIAA (or Kagan) are aggregated and unverifiable -- even by Mr. Gerbrandt. Without further substantiation, such data is meaningless. The RIAA should not be allowed to hide behind the chimera that these numbers represent "projections based on knowledge and experience" of anonymous Kagan staff. If that is the case, then the RIAA should make those staff available for cross-examination. If the numbers represent Mr. Gerbrandt's judgment

^{2/} See id. at pp.7-9 (requests No. 3, 4, 6, 8, 9, 10, 11, 12, 13, and 14).

^{3/} See documents produced by the RIAA attached to the Motion at Ref. No. 3.

alone, then the RIAA should say so.^{4/} Absent verification, references to programming expenditures and revenues should be stricken from the Gerbrandt testimony.

II. GERBRANDT AND WILKOFISKY REFERENCES TO "RIGHTS" AND "LICENSES"

In addition to the foregoing, DCR made two requests of the RIAA with respect to the testimony of Larry D. Gerbrandt, and five with respect to the testimony of David Wilkofsky, relating to those witnesses' use of the terms "rights" and "licenses."^{5/} In response to DCR's requests, the RIAA stated that these references were made on the basis of its witnesses' general knowledge and experience.^{6/} Curiously, the RIAA does not deny that documents exist to substantiate its use of these terms. Instead, the RIAA hides behind its experts, who in turn will have complete freedom to define the terms as they wish before the CARP.

Regardless of this, the RIAA's opposition to DCR's Motion fails entirely to state any reason why the foregoing documents should not be provided. For this reason alone, the

^{4/} The RIAA's protests about not requesting verification of business documents are baseless. See Opposition of the RIAA at p.4 n.1. DCR has produced numerous documents that are the product of professional judgment, but in every case these documents were prepared by or under the supervision of a DCR witness who is available for cross-examination. Documents prepared and relied upon by DCR in its ordinary course of business should not be subject to further verification. Such documents are unlike the professional testimony otherwise routinely offered in CARP proceedings.

^{5/} See DCR Request supra n.1 at p.8 (requests No. 7 and 8 with respect to the testimony of Larry Gerbrandt) and pp.9-13 (requests No. 12, 13, 14, 18 and 19 with respect to the testimony of David Wilkofsky). See also Motion at n.9 (explicitly detailing references made by both witnesses to "rights" and "licenses").

^{6/} See Letter of Steven M. Marks to Seth D. Greenstein, Fernando R. Laguarda, and Jon L. Praed, attached to the Motion at Ref. No. 2.

RIAA should be required to produce responsive documents or strike all references to the terms in its Direct Case.

As DCR set forth in its Motion, the definition of "rights" and "licenses" is of critical importance in this proceeding. The license at issue herein is clearly defined by statute. Rather than addressing the statutory license, however, the RIAA has chosen to discuss the price of cable television programming. Obviously, the CARP will have to determine whether the RIAA's approach makes sense; this is something DCR is entirely unable to do. By offering a model couched entirely as expert testimony, the RIAA has cleverly failed to provide any foundation for its argument. No documents provided by the RIAA explain precisely what is meant by the repeated use of these loaded terms. Instead, the RIAA hides behind the "judgment" of its expert witnesses.

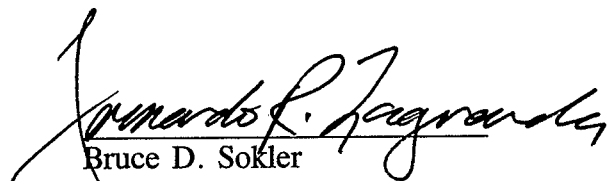
Without documentation, the "rights" and "licenses" referred to by the RIAA can be defined by its experts as the situation demands. There are no limits beyond which its witnesses cannot roam on direct examination. This approach is extremely prejudicial to DCR and should not be countenanced. Without a record of what is meant by these terms as they are used by the RIAA's expert witnesses, it will be almost impossible for DCR to analyze the RIAA's model or to cross-examine Messrs. Gerbrandt and Wilkofsky. On the other hand, the RIAA will be completely free to define the terms as it finds convenient.

Since the RIAA offers no reason why it should not be required to provide documentation underlying its use of the foregoing terms, it should produce such documents or be required to strike all references to "rights" and "license fees" from the testimony of Larry Gerbrandt and David Wilkofsky.

III. DOCUMENTS UNDERLYING THE TESTIMONY OF ZACHARY HOROWITZ

DCR's Motion made three requests of the RIAA for documents supporting or verifying the testimony of Zachary Horowitz with respect to numerous bottom line figures. In opposition, the RIAA fails to provide any reason consistent with the rules of this proceeding as to why Mr. Horowitz should be able to offer bottom line figures into the record without verification. Indeed, the RIAA completely ignores DCR's request to verify or strike the figures in the Canadian Recording Industry Association video tape. For these reasons, DCR respectfully requests the RIAA produce documents to substantiate and verify the bottom line figures referred to above. Absent the production of such documents, and in accordance with the Order, DCR respectfully requests that all references to such figures be stricken from the testimony of Zachary Horowitz and the CRIA video.

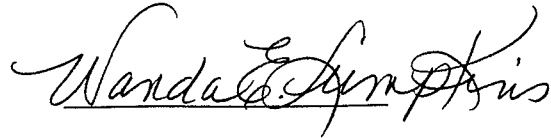
Respectfully submitted,



Bruce D. Sokler
Fernando R. Laguarda
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY and POPEO, P.C.
701 Pennsylvania Ave., N.W.
Suite 900
Washington, D.C. 20004
(202) 434-7300

Dated: January 15, 1997

I, Wanda E. Lumpkins, certify that on this 15th day of January, 1997, a copy of the foregoing Motion to Compel or, in the Alternative, to Strike Testimony of the RIAA was served on the following by facsimile/overnight mail.



David E. Leibowitz
Linda R. Bochi
Recording Industry Association
of America
1020 19th Street, N.W.
Suite 200
Washington, DC 10036
Phone: (202) 775-0101
Fax: (202) 775-7253

Robert Alan Garrett
Steven M. Marks *
Arnold & Porter
555 Twelfth Street, N.W.
Washington, DC 20004
Phone: (202) 942-5000
Fax: (202) 942-5999

* **deliver to Mr. Marks**

George Vradenburg, III
Latham & Watkins
633 West Fifth Street
Suite 4000
Los Angeles, CA 90071
Phone: (213) 485-1234
Fax: (213) 891-8763

Seth D. Greenstein
Joni L. Lupovitz
McDermott, Will and Emery
1850 L Street, N.W.,
Suite 500
Washington, DC 20006
Phone: (202) 887-8000
Fax: (202) 778-8087
Counsel for DMX, Inc.

Jon L. Praed
Latham & Watkins
1001 Pennsylvania Ave, NW
Suite 1300
Washington, DC 20004-2505
Phone: (202) 637-2200
Fax: (202) 637-2201

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

One Financial Center
Boston, Massachusetts 02111
Telephone: 617/542-6000
Fax: 617/542-2241

Fernando R. Laguarda
laguarda@mintz.com

GENERAL COUNSEL
OF COPYRIGHT

JAN 15 1997

RECEIVED

Telephone: 202/434-7300
Fax: 202/434-7400
Telex: 753689

Direct Dial Number
202/434-7347

**FILED UNDER SEAL PURSUANT TO PROTECTIVE ORDER
CONTAINS RESTRICTED AND CONFIDENTIAL RIAA MATERIAL**

January 15, 1997

VIA HAND DELIVERY

Office of the General Counsel
The Copyright Office
LM-407
The Madison Building
101 Independence Avenue, S.E.
Washington, D.C. 20001

RE: In re Determination of Statutory License Terms and Rates for
Certain Digital Subscription Transmissions of Sound
Recordings -- No. 96-5, CARP DSTR

Ladies and Gentlemen:

Enclosed please find an original and five copies of Digital
Cable Radio Associates' ("DCR") Reply in Support of Motion to
Compel or, in the Alternative, to Strike Testimony of the
Recording Industry Association of America.

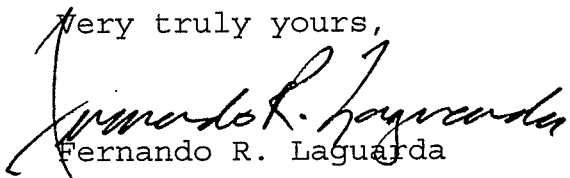
Kindly date-stamp the attached copy of this letter and
return it to the messenger as proof of service. Please do not

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

January 15, 1997
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hesitate to contact the undersigned if you have any questions about the enclosed. Thank you very much.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Fernando R. Laguarda", is written over the typed name. The signature is fluid and cursive, with a large initial 'F'.

Fernando R. Laguarda

Enclosures

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